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VII. England and Wales

A. Legislation

There were no major legislative developments relating to tort law in England and Wales in 2014. 1

B. Cases

1. *Lawrence v Fen Tigers* [2014] United Kingdom Supreme Court (UKSC) 46, [2015] Law Reports, Appeal Cases (AC) 106: Private Nuisance; Remedies[1]

a) Brief Summary of the Facts

In 2006, the claimants acquired a house in the vicinity of the defendant's speedway racing stadium, which had been constructed following the grant of planning permission in 1975 and used for speedway racing and similar pursuits for most of the intervening period. The claimants alleged that the noise from the racing constituted an unreasonable interference with the use and enjoyment of their land and was thus actionable in the tort of private nuisance. They issued proceedings in which they sought damages for the interference they had suffered to date and an injunction to regulate the use of the stadium for speedway racing in the future. Following hearings in the High Court and Court of Appeal, the case was brought to the Supreme Court. 2

b) Judgment of the Court

Upholding the trial judge's finding that there was an actionable private nuisance, the Supreme Court restored the injunction he had granted but observed 3

1 Noted by *B Pontin*, Private Nuisance in the Balance (2015) 27 Journal of Environmental Law 119.

that the defendant should be free to make an application for the injunction to be discharged and damages awarded instead. The Supreme Court emphasised that the award of damages in lieu of an injunction involves a classic exercise of discretion. Though *Shelfer's* case[2] suggested that such awards should be exceptional, no such restriction in fact exists. The guidelines formulated in *Shelfer's* case and followed in many subsequent decisions should not act as a fetter on the court's discretion. Though it would normally be right to refuse an injunction if the *Shelfer* criteria are satisfied, the fact that they are not all satisfied does not mean that an injunction should be granted. The public interest in the continuation of the defendant's activity is a relevant factor in exercising the discretion.

4 The Supreme Court also gave guidance on a range of other issues relating to the tort of private nuisance, including the relevance of the locality in which the claimant's land is located, the grant of planning permission to the defendant in respect of the activities in question and the priority in point of time of the defendant's use of his land relative to the claimant's use of his ('coming to the nuisance'); the defendant's prior use of his land was also relevant to the defence of prescription, which the Supreme Court addressed as well.

c) Commentary

5 The Supreme Court's decision heralds a change in the practice of the courts relating to the award of damages in lieu of an injunction. The power to make such awards dates back to the Chancery Amendment Act 1858 (Lord Cairns' Act) but is now to be found in sec 50 of the Senior Courts Act 1981. The traditional view was that such awards should be regarded as exceptional because they amount to the forced transfer of the claimant's property right to the defendant at a price determined by the court (the damages being seen as the fee paid by the defendant to continue committing the nuisance). In the present case, the Supreme Court disputed this characterisation, Lord Sumption describing as 'unduly moralistic' the view that awarding damages in lieu of an injunction sanctions wrongdoing by allowing the defendant to pay for the right to go on doing it.[3]

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2 *Shelfer v City of London Electric Lighting Co* [1895] 1 Law Reports, Chancery Division (Ch) 287.

3 For academic argument, see *M Wilde*, Nuisance Law and Damages in Lieu of an Injunction: Challenging the Orthodoxy of the *Shelfer* Criteria, in: S Pitel et al (eds), Tort Law: Challenging Orthodoxy (2013).

Following this decision, it probably remains the law that the victim of a private nuisance is prima facie entitled to an injunction,[4] though Lord Sumption stated the contrary opinion: 'There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests'.[5] This proposition was specifically doubted by Lord Mance,[6] however, and the question was expressly left open by the Supreme Court.[7] 6

It may be noted that, in subsequent proceedings between the same parties,[8] the Supreme Court granted a suspension of the injunction against noise nuisance until the claimant's house had been rebuilt following a fire. 7

2. *Hounga v Allen* [2014] United Kingdom Supreme Court (UKSC) 47: Illegality Defence[9]

a) Brief Summary of the Facts

Miss Hounga, then aged 14, travelled from Nigeria to the UK to work as an au pair for Mrs Allen. Mrs Allen had arranged the trip though Miss Hounga was complicit in the arrangements in pretending to be Mrs Allen's granddaughter in order to gain entry to the country. She was also aware that she had no right to work or remain in the UK. Miss Hounga was unpaid and physically abused by Mrs Allen who told her that she would be imprisoned if she left due to her illegal status. However, following an argument in 2008, Mrs Allen evicted Miss Hounga from the family home and so dismissed her from employment. Miss Hounga pursued claims for breach of contract and unfair dismissal, as well as a claim in the statutory tort of race discrimination under sec 4(2)(c) Race Relations Act 1976 (now sec 39(2)(c) Equality Act 2010). Both the Employment Tribunal and Employment Appeal Tribunal dismissed the contract and unfair dismissal claims 8

4 [121] per Lord Neuberger.
5 [161].
6 [168].
7 See also [127] per Lord Neuberger and [170] per Lord Clarke.
8 *Lawrence v Fen Tigers Ltd (No 2)* [2014] UKSC 46, [2014] 3 Weekly Law Reports (WLR) 555.
9 Noted by *R Epstein/N Squires* (2014) 178 Criminal Law and Justice Weekly 790 and *M Zou/J Goudkamp* (2015) 29 Journal of Immigration, Asylum and Nationality Law 56.

on the basis that they were tainted by illegality but allowed the statutory tort claim, awarding Miss Hounga £ 6,187 for injury to feelings. The Court of Appeal upheld Mrs Allen's appeal on the ground that there was an inextricable link between Miss Hounga's illegal act and her loss.[10] Miss Hounga appealed to the Supreme Court.

b) Judgment of the Court

9 The Supreme Court unanimously held that the defence of illegality should not apply. Lord Wilson (with whom Lady Hale and Lord Kerr agreed) grounded his judgment in public policy and found that the integrity of the legal system would not be compromised by allowing Miss Hounga's claim.[11] The damages awarded would not allow her to profit from her illegal conduct as they were to compensate her for the injury to her feelings. In addition, whilst allowing the claim was unlikely to encourage others in the position of Miss Hounga to enter into illegal employment contracts, applying the defence might well encourage those in the position of Mrs Allen to do so. Lord Wilson was also concerned that applying the defence in such a claim would 'run strikingly counter to the prominent strain of public policy' against human trafficking in the UK.[12] As such, any aspects of public policy supporting the application of the defence should give way to aspects of public policy to which its application would be an affront.[13]

10 Lord Hughes (with whom Lord Carnwath agreed) took a different approach. He found that Miss Hounga should succeed on the basis that there was an insufficiently close connection between her immigration offences and the statutory tort of discrimination.[14] The immigration offences were merely the context in which the tort was committed.[15] He was satisfied that allowing Miss Hounga to recover would not lead the court to condone behaviour it would otherwise condemn but disagreed with Lord Wilson's reference to policy on human trafficking as a separate or additional reason for the decision.[16]

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10 [2012] England & Wales Court of Appeal, Civil Division (EWCA Civ) 609.
11 At [44]–[45].
12 At [52].
13 Ibid.
14 At [59].
15 At [67].
16 Ibid.

c) Commentary

Concerns surrounding the operation of the illegality defence in England and Wales are longstanding. The defence stems from Lord Mansfield's dictum in *Holman v Johnson* that, as a matter of public policy, 'no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act'.[17] The Law Commission of England and Wales considered the operation of the defence over many years.[18] It identified six policy rationales underlying the defence, as follows: (1) furthering the purpose of the rule of law which the claimant's illegal behaviour has infringed; (2) consistency; (3) the need to prevent the claimant from profiting from his own wrong; (4) deterrence; (5) maintaining the integrity of the legal system and (6) punishment.[19] **11**

The courts have sought to develop various legal tests to determine the necessary relationship between the claimant's illegality and the claim. The 'reliance' test stemming from *Tinsley v Milligan* provides that the defence should apply where the claimant would have to rely on his illegal conduct in order to found the claim.[20] The courts have also applied the defence where the claim is 'so closely connected or inextricably bound up' with the claimant's illegality that allowing the claim would appear to condone the conduct.[21] **12**

In 2009, the Law Commission urged the courts not to apply such rigid tests but to consider, in each case, whether the application of the defence could be justified in policy terms.[22] Such transparency, it argued, would help the law develop in a way that was clearer, more certain and less arbitrary. This approach was taken in *Gray* where Lord Hoffmann stated that the defence is 'not so much a principle as a policy… based [not] upon a single justification but on a group of reasons, which vary in different situations'.[23] In *Gray* itself, Lord Hoffmann focused on the policy of consistency between criminal and civil law.[24] He then considered whether there **13**

17 (1775) 1 Cowper's King's Bench Reports (Cowp) 341 at 343.

18 *Law Commission*: The Effect of Illegality on Contracts and Trusts, Consultation Paper No 154 (1999); The Illegality Defence in Tort, Consultation Paper No 160 (2001); The Illegality Defence: A Consultative Report, Consultation Paper No 189 (2009) and The Illegality Defence, Final Report No 320 (2010).

19 *Law Commission*, 2009 (fn 18) paras 2.5–2.31.

20 [1994] 1 AC 340.

21 *Cross v Kirkby* [2000] EWCA Civ 426.

22 *Law Commission*, 2009 (fn 18) para 7.67.

23 *Gray v Thames Trains* [2009] UKHL 33 at [30]. Noted in *A Morris/K Oliphant*, England and Wales, European Tort Law (ETL) 2009 (2010) 134, no 21ff.

24 Ibid at [29].

was a sufficient causal connection between the illegality and the claimant's loss. As the common law seemed to be moving in the right direction, the Law Commission did not recommend legislative reform in the context of tort.[25]

14 The fact that Lord Wilson grounded his judgment in public policy would presumably be welcomed by the Law Commission. Nevertheless, the relationship between policy and the defence remains unclear because, as outlined above, the Lords disagreed as to whether they should look to policy considerations beyond those underpinning the illegality defence itself. In addition, Lord Wilson referred to legal tests previously developed by the courts in such a way as to leave their relevance and status unclear. He stated that the 'reliance' test had 'maximum precedential authority' but did not go on to apply it to the facts of *Hounga*.[26] Instead, he recognised the criticism that the test can work arbitrarily and approved its softening in *Stone & Rolls Ltd v Moore Stephens*[27] by the need to consider underlying policy.[28] He was critical of the causation approach advocated in *Gray* as he noted its potential for inconsistent application driven by subjective considerations.[29] He also stated that if the 'inextricable link' test applied, such a link did not exist on the facts.[30] However, he did not comment on whether such a test did in fact apply though he was critical of it. The general consensus is that the Supreme Court reached the right decision on the facts but that it has muddied the legal waters on the defence of illegality.[31]

3. *Les Laboratoires Servier v Apotex* [2014] UKSC 55: Illegality Defence[32]

a) Brief Summary of the Facts

15 Servier held a number of patents for a drug used to treat hypertension and cardiac insufficiency. A UK patent protected a crystalline form of the drug whilst a

25 *Law Commission*, 2010 (fn 18) para 3.38.
26 At [30].
27 [2009] UKHL 39, [2009] AC 1391.
28 At [30].
29 At [37].
30 At [40]–[41].
31 See *J Goudkamp/M Zou*, The Defence of Illegality in Tort Law: Beyond Judicial Redemption? [2015] Cambridge Law Journal (CLJ) 13.
32 Noted by *J Harris* (2014) 164 (7633) New Law Journal (NLJ) 10.

Canadian patent protected the compound itself. Apotex manufactured the drugs in Canada and began to sell the drugs in the UK. Servier obtained an interim injunction against them but was required to give a cross-undertaking in damages. The UK patent was found to be invalid and so Apotex became entitled to damages on the basis that it would have sold over 3.6 million packs of the drugs in the UK had the injunction not been in place. However, the Canadian courts upheld the Canadian patent, which Apotex had infringed by manufacturing the drug in that jurisdiction. This led Servier to raise the defence of illegality in the context of the damages claim in the UK. It argued that it would be contrary to public policy for Apotex to recover damages because it would have to rely on its illegal behaviour under Canadian law to establish its loss. Servier was successful at first instance but the Court of Appeal reversed Arnold J's decision and held that the defence of illegality should not apply.[33] Servier appealed to the Supreme Court.

b) Judgment of the Court

16 The Supreme Court unanimously dismissed the appeal. The infringement of the Canadian patent did not constitute 'turpitude' for the purposes of the illegality defence. Lord Sumption (with whom Lord Neuberger, Lord Clarke and Lord Mance agreed) delivered the lead judgment. He stated that turpitude in this context involves a breach of the public law of the state (or in some cases its public policy), which would include criminal and certain quasi-criminal acts such as: dishonesty or corruption; acts (such as prostitution) which are not criminal in themselves but which are contrary to public policy and which usually involve criminal liability on the part of others and breaches of statutory rules enacted to protect the public interest and attracting civil sanctions of a penal character.[34] The infringement of the patent did not constitute turpitude because it was neither a criminal nor quasi-criminal act and so did not engage the public interest.[35]

c) Commentary

17 Unlike *Hounga v Allen*, which considered the necessary relationship between the claimant's illegality and the claim, this case considered which acts consti-

33 [2012] EWCA Civ 593.
34 At [25].
35 At [30].

tute turpitude for the purposes of the illegality defence. Whilst both the Court of Appeal and Supreme Court agreed that the patent infringement was not turpitude, their reasoning differed.

18 The Court of Appeal did not consider that acts necessarily constituted turpitude or not but noted that it depended on the precise circumstances of the case.[36] The Court of Appeal was bound by the 'reliance' test laid down in *Tinsley v Milligan*.[37] However, Etherton LJ noted that a wider view of the law was open to the court given Lord Hoffmann's dicta in *Gray v Thames Trains* that the policy underlying the defence 'is not based upon a single justification but on a group of reasons, which vary in different situations'.[38] This led Etherton LJ (with whom Laws LJ and Kitchin LJ agreed) to state that in deciding whether the defence should apply, the court was entitled 'to take into account a wide range of considerations in order to ensure that the defence only applies where it is a just and proportionate response to the illegality involved in the light of the policy considerations underlying it'.[39] With this in mind, the court found that the infringement of the patent did not constitute turpitude because: Apotex honestly and reasonably believed that the Canadian patent was invalid too; Servier had enjoyed a monopoly to which it was not entitled; the patent infringement stemming from the sale of the drugs in the UK was limited to Canada; the manufacture of the drugs in Canada did not breach an interim injunction as the Canadian court had refused to grant one and any issues of public policy stemming from Apotex's actions could sufficiently be addressed through damages in the context of private law.[40]

19 Lord Toulson stated that the Court of Appeal had acted correctly in taking public policy considerations into account as the defence is based on public policy, as had been recognised by the Supreme Court in *Hounga*.[41] However, the majority in the Supreme Court did not agree that the issue should be determined by a subjective evaluation of the merits of the parties' respective claims or by an assessment of how badly Apotex had behaved.[42] Lord Sumption expressed his concern that this kind of discretionary approach could lead to inconsistency, as had happened in this case. The Court of Appeal and judge at first instance had

36 At [76] per Etherton LJ.
37 See above no 12 (fn 20).
38 At [73], citing Lord Hoffmann in *Gray v Thames Trains* (fn 23) at [30].
39 At [73].
40 At [80]–[83].
41 At [62].
42 At [21].

reached different decisions on the facts because they had attached different weight to the importance of complying with the Canadian patent and to Apotex's argument that it believed the Canadian patent to be invalid.[43]

20 Lord Sumption stated that the defence of illegality is a rule of law based on public policy and not a mere discretionary power.[44] In recognising that the policy reasons underlying the illegality defence could vary in different situations, Lord Hoffmann in *Gray* had not meant to encourage the courts to make 'value judgments about the seriousness of the illegality and the impact on the parties of allowing the defence'.[45] Instead, as courts commonly do, he had examined the policy rationale of a rule of law in order to discover what the rule was.[46] In deciding which acts constitute turpitude, therefore, the court should focus on the character of the alleged illegal act itself rather than the wider circumstances. Taking this approach, he concluded that turpitude includes 'acts which engage the interests of the state or, as we would put it today, the public interest… irrespective of the interests or the rights of the parties'.[47] Whilst criminal and quasi-criminal acts would engage the public interest, torts (other than those involving dishonesty), breaches of contract, statutory and other civil wrongs would not, as they essentially involve private rather than public interests.[48] Whilst a patent is granted by the state, it does not follow that the public interest is engaged by its infringement.[49] The interest affected is that of the patentee which can sufficiently be protected through damages.

21 The Supreme Court's clarification of the acts that constitute turpitude is to be welcomed but in other respects the decision has muddied the waters further. Following the decision in *Gray v Thames Trains*, the Law Commission felt that the courts were moving in the right direction so that legislative reform was unnecessary in the context of tort but it is now clear that the courts are interpreting *Gray* in different ways. Given the finding in relation to turpitude, the Court did not go on to consider the necessary relationship between the claimant's illegality and the claim though much confusion remains. On the one hand, whilst not referring directly to the 'reliance' test from *Tinsley v Milligan*, Lord Sumption spoke favourably of the decision and was critical of the Law Commission's

43 At [21].
44 At [13].
45 Ibid.
46 At [19].
47 At [23].
48 At [28].
49 At [30].

analysis in this area. On the other hand, Lord Touslon noted it may be necessary for the court to 'carry out a detailed re-analysis of *Tinsely v Milligan*' given subsequent authorities.[50] For those who have extra-judicially called for the Law Commission to re-examine the law in this area, even that would not be enough.[51]

22 Another area of debate is likely to stem from the required seriousness of the criminal or quasi-criminal act for the illegality defence to bite. Lord Sumption acknowledged that there would be exceptional cases where even a criminal or quasi-criminal act would not be sufficient to constitute turpitude for the purposes of the illegality defence, such as strict liability criminal offences where the claimant was not privy to the facts making his act unlawful.[52] In *Joyce v O'Brien & Tradex*, the Court of Appeal suggested that minor traffic offences should also be excluded.[53]

4. Personal Injury

a) Trends in Personal Injury Claims

23 The number of claims remained relatively stable in 2013-2014 with approximately 1,016,801 claims, compared to 1,048,309 in 2012–2013.[54] Road traffic accident (RTA) claims continued to dominate, comprising 76% of all claims. There was an increase in clinical negligence claims which rose from 16,006 in 2012–2013 to 18,499 such claims. This continues the upward trend seen in recent years though such claims continue to constitute less than 2% of all personal injury claims.

b) Parliamentary Activity

24 The number of road traffic accidents has more than doubled since 2004 and this has been attributed to a significant increase in whiplash claims which now re-

50 At [64].

51 See *J Mance*, Ex Turpi Causa – When Latin Avoids Liability (2014) 18 Edinburgh Law Review 175 and *J Sumption*, Reflections of the Law of Illegality (2012) 20 Restitution Law Review 1.

52 At [29].

53 [2013] EWCA Civ 546.

54 These figures include all personal injury claims whether successful or unsuccessful, settled or tried and have been provided by the Compensation Recovery Unit.

portedly constitute around 70% of all RTA claims.[55] Given the non-demonstrable nature of soft-tissue injuries, there are understandable concerns surrounding fraud and exaggeration. There are also concerns about the impact of such claims on the cost and availability of motor insurance.[56] As outlined in European Tort Law 2013,[57] the Ministry of Justice (MoJ) published its policy on tackling the perceived problem with whiplash claims and in 2014 it began its programme of implementation. In October, the Civil Procedure Rules were amended to fix the costs of obtaining medical reports in whiplash claims; prohibit the reporting expert from also treating the claimant and to allow defendants to submit their version of events to the expert.[58] The MoJ also consulted on reforms concerning the accreditation and commissioning of medical reports.[59] From April 2015 onwards, medico-legal experts will need to be registered with an organisation named MedCo in order to provide initial medico-legal reports for RTA soft-tissue injury claims.[60] The next phase of reforms will involve increased data sharing on claimants' patterns of behaviour. Representatives will be required to undertake a search on potential claimants' recent claims history so that they can make an informed judgement on whether to proceed with the claim.

During 2014, the Ministry of Justice also sponsored two bills affecting personal injury claims, which received Royal Assent in 2015. They stem from the Government's concerns that the tort system has become too claimant-friendly and will be reported in more detail in European Tort Law 2015. Section 57 of the Criminal Justice and Courts Act 2015 provides that where a court finds that the claimant is entitled to damages, but on the balance of probabilities is satisfied that the claimant has been fundamentally dishonest in relation to either the claim itself (the primary claim) or a related claim, it must dismiss the primary claim entirely unless it is satisfied that the claimant would suffer substantial

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55 See further *R Lewis/A Morris*, Tort Law Culture: Image and Reality (2012) 3 Journal of European Tort Law (JETL) 162 and (2012) 39 Journal of Law & Society 562 and *R Lewis*, Compensation Culture Reviewed: Incentives to Claim and Damages Levels [2014] Journal of Personal Injury Law (JPIL) 209.

56 *House of Commons Transport Committee*, The Cost of Motor Insurance, Fourth Report (HC 591, 2011).

57 See *A Morris/K Oliphant*, England and Wales, in: E Karner/BC Steininger (eds), ETL 2013 (2014) 183, no 37.

58 The Civil Procedure (Amendment No 6) Rules 2014.

59 *Ministry of Justice*, Whiplash Reform Programme: Consultation on Independence in Medical Reporting and Expert Accreditation (2014).

60 *Ministry of Justice*, Whiplash Reform Programme: Ministry of Justice Response to Consultation on Independence on Medical Reporting and Expert Accreditation (2014).

injustice as a result. The Social Action, Responsibility and Heroism Act 2015 provides that in deciding whether a defendant is in breach of duty, the court must consider whether the defendant: was acting for the benefit of society at the time of the alleged breach; had demonstrated a predominantly responsible approach towards protecting the safety or other interests of others; or was acting heroically by intervening in an emergency to assist an individual in danger.

c) Legal Issues

26 In 2014, the Court of Appeal dealt with two interesting cases on vicarious liability. *Mohamud v WM Morrison Supermarkets Plc* concerned a claimant of Somali descent who visited a petrol station owned by the defendants.[61] He went to the kiosk to ask a question but the employee responded in an abusive and racist manner and so he returned to his car. Despite remonstrations from his supervisor, the employee followed the claimant and physically assaulted him in a 'brutal and unprovoked' attack. The Court of Appeal found that the defendant was not vicariously liable for the employee's assault as there was an insufficiently close connection between the wrongdoing and the employment. The fact that the claimant was assaulted on the defendant's premises by an employee during working hours and that the employment provided the opportunity, setting, time and place for the tort to occur was not enough for a close connection to arise. Some other feature going beyond the interaction between the employee and the victim was required. It was noted that previous cases had examined the question of close connection by reference to factors such as the granting of authority, the furtherance of the employer's aims, the inherence of friction or confrontation in the employment and the additional risk of the kind of wrong occurring. However, no such factors were present in this particular case.

27 In the second case, *Cox v Ministry of Justice*, the Court of Appeal held that the relationship between the MoJ and a prisoner working in the prison kitchen was akin to employment so that vicarious liability could arise.[62] The claimant, a catering manager at the prison, sustained a serious injury when a prisoner working in the kitchen negligently dropped a large sack of rice on her back as she was bending down. With reference to criteria laid down in *Various Claimants v Catholic Child Welfare Society & Others*, the Court of Appeal stated that the MoJ was more likely to have the means to compensate the victim than the

61 [2014] EWCA Civ 116.

62 [2014] EWCA Civ 132. Noted by *A Bell* (2014) 2 Journal of Professional Negligence 107.

prisoner and could be expected to have insured against the liability.[63] The MoJ, in requiring the prisoner to work in the kitchen, had created the risk of the tort committed and the prisoner had been under the control of the MoJ. The work carried out was different from, for example, the rehabilitation of prisoners and was essential to the functioning of the prison and the use of prisoners relieved the MoJ from having to engage employees at market rates. As the MoJ took the benefit of this work, the Court of Appeal could see no reason for it not to take its burdens. Both *Mohamud* and *Cox* were appealed to the Supreme Court, the decisions of which shall be reported in European Tort Law 2015.

28 In *Thompson v Renwick Group Plc*, the Court of Appeal again considered whether a parent company owed a duty of care to an employee of one of its subsidiaries.[64] The claimant was employed by two companies between 1969 and 1978. Both companies exposed him to asbestos and both became subsidiaries of Renwick Group plc through a series of acquisitions. In 1976, the defendant appointed a new director to the second company who was involved in health and safety matters. Unfortunately, the claimant later developed pleural thickening but by this time neither company was worth suing nor had liability insurance in place. In *Chandler v Cape plc*, the Court of Appeal had held that it was not necessary for a parent company to have absolute control of its subsidiary for a duty to arise but only 'relevant control' where: (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in a particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.[65] However, in *Thompson,* the court clarified that these factors were descriptive rather than exhaustive and in any event did not find that the factors were satisfied on the facts of the case. A duty did not arise just because the parent company had appointed a director to the second company who had some health and safety responsibilities. In addition, it had not been shown that the claimant's employers carried on the same business as the parent company or that the latter had any better knowledge or understanding of asbestos. The evidence suggested that the parent company simply held shares in the companies and so it would not be fair, just or reasonable for a duty to be imposed.

63 [2012] UKSC 56, [2013] 2 AC 1.

64 [2014] EWCA Civ 635.

65 [2012] EWCA Civ 525. Noted by *A Morris*/*K Oliphant*, England and Wales, in: K Oliphant/BC Steininger (eds), ETL 2012 (2013) 163, no 60.

29 In *Haxton v Philips Electronics UK Ltd* the claimant's husband had died as a result of mesothelioma caused by the defendant's negligence and so she had pursued a claim for loss of dependency under the Fatal Accidents Act (FAA) 1976.[66] However, the claimant was herself then diagnosed with mesothelioma as a result of having washed her husband's clothing. She settled her claim under the FAA 1976 for £ 200,000 less than she otherwise would have done based on her reduced life expectancy. She then pursued her own personal injury action against the defendant in negligence which included a claim for the £ 200,000 diminution in value of her FAA claim. She argued that but for the defendant's negligence, her life would not have been cut short and the assessment of her dependency claim would have been greater. The Court of Appeal found in her favour. Allowing the appeal would not interfere with the operation of the FAA scheme and there was nothing to suggest that Parliament intended to deny a claimant the right of recovery in such a situation. It was possible at law to recover losses for a period when a claimant was no longer living and so she could recover losses for a period when she would not in fact have been dependent, especially as she had actually suffered the loss when she was alive. In addition, the loss was not too remote as it was reasonably foreseeable that a curtailment of life might lead to a diminution in the value of the claim even if it had involved a different tortfeasor.

30 In *Cox v Ergo Versicherung AG*, the claimant's husband was a British national serving with the British armed forces in Germany.[67] He was fatally injured in a road traffic accident caused by a German national insured by a German insurance company. The claimant had been living with her husband in Germany at the time of the accident but had since returned to England and had two children with a new partner. Neither jurisdiction nor liability were in issue but the applicable law governing the quantification of damages was tried as a preliminary issue. It was common ground that the claimant could bring a claim directly against the German insurer of the negligent driver in the English and Welsh courts. The parties agreed that German law governed the determination of liability but disagreed as to which law applied in relation to the quantification of damages. The claimant argued that the Fatal Accidents Act (FAA) 1976 applied as this would result in more generous compensation than German law allowed in two respects. First, the FAA expressly excludes consideration of remarriage or the prospect of remarriage in assessing damages whereas German law may take account of any right to maintenance as a result of marriage or the birth of a

66 [2014] EWCA Civ 4. Noted by *A Burin* (2014) 77 Modern Law Review (MLR) 983.

67 [2014] UKSC 22. Noted by *HM Jack* (2014) 164 (7615) NLJ 9.

child. Second, the FAA provides for a bereavement award for solatium whereas German law requires proof of psychological disturbance beyond normal grieving and comparable to physical injury. The Supreme Court held that the claimant's damages should be assessed in accordance with the law of England and Wales but excluding the FAA. The relevant fatality arose prior to Rome II Regulation EC 864/2007 and so the claim was governed by the Private International Law (Miscellaneous Provisions) Act 1995. This provides that issues of substance will usually be determined in accordance with the place of injury whilst issues of procedure are to be determined in accordance with the law of the forum. The Supreme Court found that the FAA does not lay down general rules of English law but only rules applicable to actions under the Act itself. The action here arose under German law and so damages could not be assessed with reference to the FAA. Instead, damages should be assessed in accordance with the normal common law so that the claimant should be put in the position she would have been in had her husband not been fatally injured. This meant that credit must be given for maintenance received from her current partner.

C. Literature

1. *Mark Davies*, The Law of Professional Immunities (Oxford University Press, Oxford 2014)

The declared aim of this interesting and imaginatively conceived book is to ana- 31
lyse and critically review approaches to professional immunities, consider their purported rationales, and address more broadly the interaction of immunities with wider issues of professional negligence and regulation. The 'immunities' considered are construed rather broadly to encompass various forms of protective stance taken by the law towards professional persons (including the denial of a duty of care on grounds of 'policy'). The author also takes a broad and flexible approach to what constitutes a 'profession' for these purposes, and addresses each of the following in turn: judges and other participants in court and dispute resolution processes (including advocates and expert witnesses), academics, medical practitioners, the police, the military and other uniformed services, local government professionals (including those in the child welfare and educational fields), professional advisors (including accountants and solicitors), journalists and MPs. A theme running through the analysis is that the number of professional immunities has been dwindling in recent years, and

their scope diminishing, though some immunities apparently remain deeply entrenched. There is thus a lack of consistency in the law's treatment of these issues, which leads the author to propose – at least for now – a negative answer to the question he asks in his concluding chapter: is there a 'law of professional immunities'? Notwithstanding this downbeat finale, the book constitutes a substantial addition to the existing literature on professional liability and can certainly be recommended.

2. *Paula Giliker*, The Europeanisation of English Tort Law (Hart Publishing, Oxford 2014) Hart Studies in Private Law[68]

32 In this thoughtful and perceptive volume, Giliker provides an excellent account of the (limited) influence to date of EU law and European human rights law on the English law of tort, and charts a way forward for English lawyers towards what she considers would be a more rewarding engagement with European sources. She rightly points out that many English lawyers have been resistant to European influence, seeing it as an attack on the integrity and coherence of the common law. This has created an environment in which 'alien' concepts introduced into English law from Europe have either been strictly delimited so as to keep them separate and distinct from ordinary tort law (as has occurred with claims for violating Convention rights under the Human Rights Act 1998) or absorbed into its fabric by analysing them in terms of established English law categories (eg EU principles of Member State liability have been categorised within the tort of breach of statutory duty, while claims for violation of the right to privacy have been brought under the umbrella of breach of confidence). Giliker urges her compatriots to be more open to European influences, which she convincingly portrays as providing the impetus for improvements in the quality of English tort law (see also *Oliphant* (2009) 62 Current Legal Problems 440, 469ff). The book is highly recommended, not just for those English lawyers who are the objects of Giliker's entreaties, but also for anyone interested in the reception of European legal principles within national legal systems.

68 Reviewed by *M Groppo* (2014) 25 King's Law Journal 476.

3. *Sir Peter North*, Occupiers' Liability (Oxford University Press, Oxford, 2nd edn 2014)

33 This is the second edition of a book whose first edition was published in 1971. In the long gap between editions, the law has moved on significantly, not least because of the legislative recognition of a duty of care to trespassers in the Occupiers' Liability Act 1984. Naturally, the new Act is subjected to detailed analysis in the new edition. The book's coverage has also been extended to include the Defective Premises Act 1972, which deals not only with the liability of landlords out of possession for dangers on the premises (replacing provisions of the Occupiers' Liability Act 1957) but also with the liability of builders, while providing for the duty of care owed in respect of any work on or in relation to premises not to be abated by the subsequent disposal of the premises by the person owing the duty. The book provides a short introductory account of the background to the various statutes before addressing the key concepts of 'occupier', 'visitor' and 'premises'. It then looks in more detail at the scope and content of the occupier's statutory duty of care, contrasts the 'occupancy' and 'activity' duties owed by the occupier, examines the extent of liability under the Occupiers' Liability Acts for different types of harm, and considers the various defences available. The book provides concise and authoritative answers to numerous questions that have arisen or are likely to arise in practice and is, all in all, an extremely useful resource.

4. *John Oberdiek* (ed), Philosophical Foundations of the Law of Torts (Oxford University Press, Oxford 2014)

34 This volume was explicitly conceived as the successor to the collection entitled 'Philosophical Foundations of Tort Law' published by OUP under the editorship of David Owen in 1995. In his insightful and informative introduction, Oberdiek traces the historical lineage back to the pioneering work done on tort's philosophical foundations by Fletcher, Coleman, Weinrib and Honoré, whose mantle has been taken up by the more established scholars represented in this volume (such as Keating, Perry, and Goldberg and Zipursky) and passed on to a younger generation amongst whom the editor counts himself. Highlights amongst the 19 original contributions include Goldberg and Zipursky's refinement of their well-known 'civil recourse' theory, Cane on 'Tort Law and Public Functions', Simons on the relationship between consent, assumption of risk and victim negligence,

Sebok on normative theories of punitive damages and Gardner on the place of distributive justice within the law of tort, an institution of corrective justice. No doubt others would pick out other contributions as particular favourites: the overall level of quality is exceedingly high. The book as a whole offers an excellent indication of the state of tort law theory in 2015 and stands as a worthy successor to Owen's edited collection of 1995.

5. *Ben Pontin*, Nuisance Law and Environmental Protection: A Study of Nuisance Injunctions in Practice (Lawtext Publishing, Witney 2014)[69]

35 This is one of two books published in 2014 to address the previously neglected question of 'what happens next' after a nuisance injunction has been awarded. Like Rosenthal (see no 37 below), Pontin selects a number of nuisance decisions as case studies in which he investigates the consequences of the award. He chooses four well-known cases, each concerning serious pollution from fast-developing industry, one of which (*Attorney-General v Birmingham Corporation*) is also in Rosenthal's selection, thus providing a useful opportunity to compare the rival approaches and conclusions. Pontin's research is based mainly on published books and public records, and he is much more interested in the personalities involved in his chosen cases – especially the claimants, whom he portrays in heroic light as proto-environmentalists (see especially p 59). Like Rosenthal, he gives little credence to the conjecture that awarding an injunction might cause the closure of the polluting enterprise, but he sets greater store on the alternative hypothesis that the injunction might induce investment in cleaner technology and so result in significant pollution-reduction (about which Rosenthal is somewhat sceptical, having regard to the limits of what was possible and reasonably affordable at the time). Conversely, Pontin is extremely dubious of the scope for 'Coasian' agreements whereby the defendant subject to the injunction effectively buys the claimant's permission to continue the polluting activity. He pleads his case well, and his illuminating and learned study is certainly to be recommended, both in its own right and as a complement to Rosenthal's alternative account.

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69 Reviewed by *M Lee* (2014) 77 MLR 669 and *M Wilde* (2015) 36 Journal of Legal History 122.

6. *James Price QC*/*Felicity McMahon* (eds), Blackstone's Guide to The Defamation Act 2013 (Oxford University Press, Oxford 2013)

The Defamation Act 2013[70] codified aspects of the law of libel and slander in England and Wales at the same time as introducing substantive reforms with the expressed aim of ensuring better protection of freedom of expression while maintaining an appropriate balance with the protection of reputation. This very useful volume describes the background to the Act (including the Ministry of Justice's consultation and the Act's passage through Parliament) and then provides detailed analysis of its provisions, drawing upon the Parliamentary debates to illuminate key concepts. The book provides an ideal starting point if one wants to understand the new requirement of 'serious harm', the new statutory defences of truth, honest opinion or matter of public interest, the new protections given to the operators of websites and the publishers of peer-reviewed statements in scientific or academic journals, the new 'single publication rule', or the other changes effected by the Act. Though aimed primarily at legal practitioners, the guide will also be of considerable use to academics and students with interests in the law of libel and slander. 36

7. *Leslie Rosenthal*, The River Pollution Dilemma in Victorian England: Nuisance Law versus Economic Efficiency (Ashgate Publishing, Farnham 2014) Modern Economic and Social History

Rosenthal provides an engrossing and insightful account of the resolution of legal disputes caused by 'the river pollution dilemma' in Victorian England. The dilemma in question arose because the sanitation systems devised to ensure the health of rapidly growing urban populations unavoidably led to the discharge of large amounts of sewage effluent in nearby rivers and thus interfered with the property rights of riparian landowners. In ten detailed case studies, he shows how the landowners affected were able to get injunctions in the 37

70 Noted by *Oliphant*/*Morris* (fn 57) 183, no 1ff.

law of nuisance. But, for the author, that is only the starting point for inquiry, as his interest is not so much in court judgments or substantive legal rules but in the question 'what happened next?' He therefore explores the historical record to see how, if at all, the injunctions were enforced in practice, what further dealings there were between the parties, and what further involvement by the court, and what was ultimately the impact on the defendants' activities and water quality in rivers. A key and original insight is that courts often issued *contingent* injunctions which would only be triggered if, for example, the defendant failed to take appropriate steps to prevent or reduce the pollution. The judge thus assumed a post-trial supervisory or managerial role so as to promote the satisfactory resolution of the dispute. Of further note is that this was achieved in all ten of the chosen cases without seriously compromising the sewerage systems involved. The author's findings are based on meticulous research encompassing (inter alia) court records, town council minutes, local newspapers and family archives, and are informed by theoretical insights derived from the economic analysis of law. All in all, it counts as a major addition to the literature.

8. New Editions of Established Texts

38 **Textbooks**: *P Giliker*, Tort (5th edn 2014); *K Horsey*/*E Rackley*, Tort Law (3rd edn 2013); *WE Peel*/*J Goudkamp*, Winfield & Jolowicz on Tort (19th edn 2014)

39 **Practitioners' Reference**: *MA Jones* (general ed), Clerk & Lindsell on Torts (21st edn 2014)

40 **Text and Materials**: *M Lunney*/*K Oliphant*, Tort Law: Text and Materials (5th edn 2013); *J Steele*, Tort Law: Text, Cases and Materials (3rd edn 2014)

41 **Comparative Tort Law**: *C van Dam*, European Tort Law (2nd edn 2013)

9. Selected Articles

42 **Negligence**: *N Poole*, Medical Innovation Bill: Re-writing the Law of Clinical Negligence [2014] JPIL 127

43 **Nuisance**: *L Collins*, Evergreen? The Environmental Law of Torts (2014) 22 Tort Law Review (Tort L Rev) 107

Defamation and Privacy: *D Erdos*, Data Protection and the Right to Reputation: Filling the "Gaps" after the Defamation Act 2013 [2014] CLJ 536; *J Hartshorne*, The Protection of Prosser's Privacy Categories within English Tort Law (2014) 22 Torts Law Journal (TLJ) 37; *NA Moreham*, Beyond Information: Physical Privacy in English law [2014] CLJ 350; *A Mullis*/*A Scott*, Tilting at Windmills: The Defamation Act 2013 (2014) 77 MLR 8 **44**

Economic Torts: *J Murphy*, Understanding Intimidation (2014) 77 MLR 33 **45**

Strict Liability: *T Keren-Paz*, Injuries from Unforeseeable Risks which Advance Medical Knowledge: Restitution-Based Justification for Strict Liability (2014) 5 JETL 275; *J Morgan*, Strict Liability for Police Nonfeasance? The Kinghan Report on the Riot (Damages) Act 1886 (2014) 77 MLR 434 **46**

Public Authority Liability: *J de Mot*/*M Faure*, Public Authority Liability and the Chilling Effect (2014) 22 Tort L Rev 120 **47**

Causation: *T Clark*/*D Nolan*, A Critique of *Chester v Afshar* (2014) 34 Oxford Journal of Legal Studies (OJLS) 659; *S Fulham-McQuillan*, Judicial Belief in Statistics as Fact: Loss of Chance in Ireland and England (2014) 30 Professional Negligence (PN) 9; *D Hamer*, 'Factual Causation' and 'Scope of Liability': What's the Difference? (2014) 77 MLR 155; *G Turton*, Using NESS to Overcome the Confusion created by the 'Material Contribution to Harm' Test for Causation in Negligence (2014) 30 PN 50 **48**

Tort Law and Human Rights: *J Wright*, A Damp Squib? The Impact of Section 6 HRA on the Common Law: Horizontal Effect and Beyond [2014] Public Law (PL) 289 **49**

Tort Law History: *K Oliphant*, Tort Law, Risk and Technological Innovation in England (2014) 59 McGill Law Journal 819 **50**

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Tort Law Theory: *K Barker*, 'Damages Without Loss': Can Hohfeld Help? (2014) 34 OJLS 631; *N Jansen*, The Idea of Legal Responsibility (2014) 34 OJLS 221; *D Priel*, Tort Law for Cynics (2014) 77 MLR 703; *D Priel*, Private Law: Commutative or Distributive? (2014) 77 MLR 308; *A Slavny*, Nonreciprocity and the Moral Basis of Liability to Compensate (2014) 34 OJLS 417; *JNE Varuhas*, The Concept of 'Vindication' in the Law of Torts: Rights, Interests and Damages (2014) 34 OJLS 253

The Tort System: *R Lewis*, Compensation Culture Reviewed: Incentives to Claim and Damages Levels [2014] JPIL 209 **52**

53 **Alternative Sources of Compensation**: *D Miers*, Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme 2012 (2014) 34 Legal Studies (LS) 242

54 **Comparative Tort Law**: *MD Green*/*WC Powers Jr*, Drafting a Torts Restatement: Of Swiss Cheese, Gravity and Process (2014) 22 Tort L Rev 31; *P Kitson*, Liability Issues in Cycling Claims: A Comparative Analysis of Civil Liability in European Jurisdictions [2014] JPIL 242